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In the Supreme Court of the United States

OCTOBER TERM, 1992

JOSE ANTONIO ORTEGA-RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a court of appeals may dismiss an appeal by a convicted defendant who fled following his conviction but was recaptured and returned to custody 11 months later.

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OPINIONS BELOW

The orders of the court of appeals granting the government's motion to dismiss petitioner's appeal (J.A. 78) and denying petitioner's motion to reinstate the appeal (J.A. 93) are unreported.

JURISDICTION

The order of the court of appeals granting the government's motion to dismiss petitioner's appeal (J.A. 78) was entered on July 19, 1991, and the order denying petitioner's motion to reinstate the appeal (J.A. 93) was entered on January 22, 1992. The petition for a writ of certiorari was filed on March 17, 1992, and was granted on June 15, 1992. J.A. 94. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

STATUTE AND RULE INVOLVED

28 U.S.C. 1291 provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Rule 47 of the Federal Rules of Appellate Procedure provides:

> Each court of appeals by action of a majority of the circuit judges in regular active service may from time to time make and amend rules governing its practice not inconsistent with these rules. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules. Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possession with intent to distribute cocaine while on board a vessel of the United States, in violation of 46 U.S.C. App. 1903(a), and conspiracy to commit that offense, in violation of 46 U.S.C. App. 1903(j). J.A. 68. Petitioner fled before sentencing and was sentenced *in absentia*. He was recaptured 11 months later and resentenced. J.A. 80. The court of appeals dismissed the appeal petitioner took from that judgment. J.A. 78.

1. The evidence at trial showed that, on November 7, 1988, the Customs Service received reports of a possible air drop of narcotics in the Cay Sal Bank area of the Bahamas, located south of the Florida Keys and north of Cuba. At dusk that evening, a Customs pilot flying in the area saw a plane circling a boat at low altitude. The plane dropped 20 bales into the water, which were picked up by the boat. When the plane left the area, the Customs pilot followed it to Cuban airspace before abandoning pursuit. The Customs pilot was unable to locate the boat when he flew back over the area of the air drop 40 minutes later. J.A. 19-20.

The following morning, the pilot of a second Customs aircraft, launched to search for the boat near Cay Sal, spotted a vessel, the *Wilfred* from Miami, Florida, that appeared to fit the first pilot's description. The pilot observed the *Wilfred* traveling away from the island toward Cuba with a cover over the back of the boat that hid its name. When the pilot flew over Cay Sal, he saw numerous bales wrapped in white plastic and stacked above the high water mark on the beach. He also saw footprints on the beach between the stacked bales and the water line near where he had originally sighted the *Wilfred*. J.A. 20-21.

The pilot radioed the Coast Guard, requesting that the *Wilfred* be intercepted. The Coast Guard contacted the *Wilfred* by radio and asked a series of standard pre-boarding questions. After responding three times that the *Wilfred*'s last port of call was

Cayo Blanco, the captain of the *Wilfred* changed his answer and stated that he had departed from Key Largo, Florida. He also stated that the *Wilfred* was heading back to Key Largo and that the purpose of the voyage had been fishing. The Coast Guard boarded the *Wilfred*, but a full inspection revealed no contraband. Eventually, petitioner and the two other persons on board the vessel, Roberto Mieres-Borges and Osvaldo Becerra-Flores, were arrested. J.A. 18-19, 22-23. Law enforcement agents later recovered several bales containing cocaine from the beach site on Cay Sal. J.A. 28-29.

2. The jury convicted petitioner and his two co-defendants on March 24, 1989. Sentencing was set for June 15, 1989, but petitioner failed to appear at that time. He was sentenced *in absentia* to 235 months' imprisonment, to be followed by five years of supervised release. J.A. 54, 68. No appeal was taken from that judgment.

The district court issued a warrant for petitioner's arrest, and 11 months later, on May 24, 1990, petitioner was arrested and remanded to custody. See J.A. 68-69. The district court subsequently granted petitioner's motion to vacate his sentence so that he could be resentenced in person. J.A. 10.

While petitioner was a fugitive, his two co-defendants appealed their convictions. The Eleventh Circuit affirmed Mieres-Borges's conviction, but it held the evidence insufficient to sustain Becerra-Flores's conviction. See *United States* v. *Mieres-Borges*, 919 F.2d 652 (11th Cir. 1990); J.A. 17-45. Relying on that decision, petitioner moved in the district court, after his recapture, for a judgment of acquittal. The district court denied that motion and resentenced petitioner. On January 11, 1991, the court imposed a

sentence of 188 months' imprisonment, to be followed by a five-year term of supervised release. J.A. 46-50, 51-56.[1]

3. Petitioner noticed an appeal from that judgment.[2] J.A. 57. Relying on *United States* v. *Holmes*, 680 F.2d 1372 (11th Cir. 1982), cert. denied, 460 U.S. 1015 (1983), and *United States* v. *London*, 723 F.2d 1538 (11th Cir.), cert. denied, 467 U.S. 1228 (1984), the government moved to dismiss the appeal on the ground that petitioner had waived his right to appeal from his narcotics convictions when he fled after conviction and before sentencing, and remained at large for the next 11 months. J.A. 66-71. On July 19, 1991, the court of appeals issued an order granting the motion to dismiss the appeal. J.A. 78. Following further briefing, J.A. 79-92, the court denied petitioner's motion to reinstate the appeal. J.A. 93.

SUMMARY OF ARGUMENT

A. Courts of appeals have long enjoyed authority to enforce procedural rules establishing reasonable conditions on the exercise of their appellate jurisdic-

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[1] Petitioner was subsequently convicted of contempt of court, in violation of 18 U.S.C. 401(3), and failure to appear for his original sentencing, in violation of 18 U.S.C. 3146. He was sentenced to 21 months' imprisonment on those charges, to be served consecutively to his 188-month sentence on the narcotics charges. J.A. 58-60.

[2] Petitioner filed his notice of appeal on January 28, 1991. J.A. 81. Because the judgment was entered on the criminal docket on January 23, 1991, and because the 10-day time limit for filing an appeal under Fed. R. App. P. 4(b) runs from the date of the "entry of" the judgment on the docket, rather than from the date the order is signed or filed with the clerk, petitioner's appeal was timely.

tion. Those rules have traditionally authorized courts to dismiss the appeals of defendants who have become fugitives after trial. Rules providing for dismissal of fugitives' appeals are within the supervisory authority of the courts of appeals as long as they are (1) not inconsistent with the Constitution or a statute, (2) within the authority of courts to establish through adjudication, and (3) reasonable in light of the interests they seek to promote.

Rules requiring dismissal of the appeals of defendants who have absconded before disposition of their appeals satisfy each of those conditions. Fugitive-dismissal rules are not inconsistent with either the Constitution, which does not grant a right of appeal at all, or the statute governing appeals from final judgments in criminal cases, which does not bar the courts from conditioning the exercise of appellate jurisdiction on compliance with reasonable procedural rules. Such rules are also within the authority of courts of appeals to act through adjudication to "regulate their practice in any manner not inconsistent with" the Federal Rules of Appellate Procedure. Fed. R. App. P. 47. Finally, fugitive-dismissal rules are reasonable, because they promote the interests in orderly procedure, discourage escapes and encourage voluntary surrenders, and reflect a determination not to extend the benefits of appellate review to persons who have displayed contempt for the courts' authority by fleeing. Those justifications apply equally to fugitives who remain at large throughout the appellate process and to those who are captured prior to the order of dismissal.

B. The same rationale underlies the courts' authority to dismiss appeals by defendants such as petitioner, who became a fugitive after he was convicted but before he filed a notice of appeal. Flight

by a convicted defendant is equally disruptive whether it occurs before or after filing a notice of appeal, and the interests in discouraging flight and refusing to extend the benefit of an appeal to those who exhibit contempt for the system are equally applicable regardless of whether a notice of appeal has been filed. In this case, it is particularly hard to justify treating pre-appeal flight differently from post-appeal flight, since petitioner was sentenced *in absentia*, and if his counsel had filed a notice of appeal on his behalf from his initial sentence, it would have been indisputably proper for the court of appeals to dismiss his appeal. It was only petitioner's failure to file a notice of appeal following the original sentencing, and the district court's willingness to resentence him after his recapture, that has enabled petitioner to characterize the period of his fugitivity as part of the "pre-appeal" period. In all pertinent respects, the 11-month post-trial period during which petitioner was a fugitive is equivalent to the "post-appeal" period, and it was reasonable for the court of appeals to treat petitioner's case in the same way it would have if petitioner had already filed his notice of appeal.

The Eleventh Circuit's fugitive-dismissal rule is not invalid on the ground that, as petitioner complains, it is unduly rigid. In this case, as in the two prior published decisions in which the Eleventh Circuit has dismissed appeals by defendants who became fugitives before filing their notices of appeal, the defendant remained a fugitive for a lengthy period of time and did not return to custody voluntarily, but was captured. It is not unreasonable for a court to dismiss appeals in cases in which the appeal would have been pending (and perhaps disposed of) but for the defendant's flight, particularly where the

defendant does not voluntarily surrender, but returns to the jurisdiction of the court only because the government is able to defeat his effort to remain at large. It is entirely possible that the Eleventh Circuit would not dismiss the appeal of a defendant who became a fugitive for only a short period and voluntarily returned at a time that had no effect on the disposition of the case in the court of appeals. But regardless of how the court would dispose of such a case, petitioner cannot prevail on the ground that the court's dismissal rule may be subject to unreasonable application in some other, hypothetical case.

ARGUMENT

A COURT OF APPEALS MAY DISMISS THE APPEAL OF A DEFENDANT WHO FLEES AFTER CONVICTION AND IS RECAPTURED PRIOR TO SENTENCING AND APPEAL

A. The Courts Of Appeals May Make Rules Providing For The Dismissal Of Appeals By Fugitive Defendants Even After Their Return

This Court has held that, absent a conflict with the Constitution or a statute, a court of appeals may exercise its supervisory authority to devise "procedural rules governing the management of litigation." *Thomas* v. *Arn*, 474 U.S. 140, 146 (1985). Thus, courts may make rules requiring an appellant, as a condition of maintaining his appeal, to file a timely notice of appeal (see Fed. R. App. P. 4), to file a brief in a timely fashion (see Fed. R. App. P. 31), or to comply with rules governing the processing of the appeal (see, *e.g.*, 11th Cir. R. 42-1). See generally *Coppedge* v. *United States*, 369 U.S. 438, 441-444 (1962).

The courts of appeals do not need specific statutory authorization to make such rules. Rather, the courts can mandate procedures that are "deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution." *Thomas* v. *Arn*, 474 U.S. at 146-147 (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973)). Failure to abide by those procedural rules can result in waiver of the statutory right to appeal. See *Thomas* v. *Arn*, 474 U.S. at 147 ("Had petitioner failed to comply with a scheduling order or pay a filing fee established by a court of appeals, that court could certainly dismiss the appeal."); see also *Link* v. *Wabash R. R.*, 370 U.S. 626 (1962).

A rule authorizing a court to dismiss the appeals of fugitive defendants is within the supervisory power of a court of appeals if it satisfies three criteria: (1) it must not conflict with the Constitution or any statute; (2) it must be the kind of rule that can properly be established through adjudication; and (3) it must be reasonable in light of the concerns that it is designed to address. See *Thomas* v. *Arn*, 474 U.S. at 145-148. The rule applied by the court of appeals in this case satisfies each of those requirements.

1. *The Court of Appeals' Rule Does Not Conflict With Any Constitutional Or Statutory Provision*

A rule permitting dismissal of the appeal of a defendant who has become a fugitive does not conflict with the Constitution or any statute. It is well settled that a convicted criminal has no constitutional right to appeal. *Abney* v. *United States*, 431 U.S. 651, 656 (1977); see also *McKane* v. *Durston*, 153 U.S. 684,

687-688 (1894); *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956). The right to appeal is "purely a creature of statute." *Abney* v. *United States*, 431 U.S. at 656; see *United States* v. *Parrish*, 887 F.2d 1107, 1108 (D.C. Cir. 1989). Nor does the denial of appeal rights to fugitives deprive a fugitive defendant of the equal protection of the laws. See *Estelle* v. *Dorrough*, 420 U.S. 534 (1975) (per curiam).

Likewise, there is no inconsistency between a rule providing for dismissal of a fugitive's appeal and any statute governing appeals in criminal cases. The statute giving criminal defendants the right to appeal from final judgments against them is 28 U.S.C. 1291. That statute confers jurisdiction on courts of appeals "from all final decisions of the district courts of the United States." The statute, however, does not set forth the procedural requirements for perfecting an appeal. Those requirements are established by rules of court—principally, the Federal Rules of Appellate Procedure and the local rules of the courts of appeals. Those procedural rules, as supplemented by rules established by the courts through adjudication, merely establish conditions on the exercise of the statutory right to appeal. They are not inconsistent with the grant of appellate jurisdiction in Section 1291. See *Thomas* v. *Arn*, 474 U.S. at 146-147.

2. *The Court of Appeals Properly Addressed the Issue of Fugitive Appeals Through Adjudication*

In 1982, the Eleventh Circuit established the dismissal rule applied in this case. The court announced the rule in *United States* v. *Holmes*, 680 F.2d 1372 (1982), cert. denied, 460 U.S. 1015 (1983). There,

the court dismissed the appeal of a defendant who became a fugitive for two years after his conviction but before sentencing. Besides challenging the reasonableness of that rule, petitioner argues (Br. 10) that it was improper for the court of appeals to establish a fugitive-dismissal rule through adjudication. He contends that courts of appeals may exercise their authority to formulate procedural rules of litigation management only "in accordance with the [formal] rule-making power," not in the course of litigation. Pet. Br. 10.

That argument ignores the broad rulemaking authority that courts of appeals are granted, as well as the long tradition of establishing fugitive-dismissal rules through adjudication. Rule 47 of the Federal Rules of Appellate Procedure provides that "[i]n all cases not provided for" by formal rules that have been promulgated by a vote of the circuit judges, "the courts of appeals may regulate their practice in any manner not inconsistent with" the federal rules of procedure in general. Thus, Rule 47 broadly permits a court of appeals to establish procedural rules through adjudication, as well as through legislative rulemaking.

That broad grant of authority is consistent with this Court's analysis in *Thomas* v. *Arn*, *supra*. The Sixth Circuit's rule conditioning an appeal on a party's objection to a magistrate's recommendation, which was at issue in *Thomas*, was established through adjudication. This Court upheld the rule and the dismissal sanction as an appropriate exercise of the court of appeals' supervisory power. The fugitive-dismissal rule, which also involves a dismissal sanction for failure to follow litigation rules, is an equally appropriate subject for adjudicative rulemaking.

Although petitioner challenges the court of appeals' authority to fashion the rule applied in this case, he does not question the authority of this Court or the courts of appeals to adopt by adjudication a rule of discretionary dismissal of appeals brought by persons who are fugitives at the time the motion to dismiss is filed. Such rules have been created through adjudication and applied by this Court and the courts of appeals for years. Indeed, petitioner endorses the cases establishing those rules. See Pet. 7. Yet there is no difference in the source of authority to make those rules and the rule at issue in this case; the only difference between the two cases is that the rule in this case would apply to defendants who are recaptured before filing a notice of appeal.[3] Thus, the question for decision in this case reduces to whether it is reasonable for a court of appeals to extend the fugitive-dismissal rule to a case such as this one.

[3] In challenging the court of appeals' authority to make rules through adjudication regarding the dismissal of a former fugitive's appeal, petitioner relies on this Court's decision in *United States* v. *Robinson*, 361 U.S. 220, 229 (1960). That decision, however, does not help petitioner. *Robinson* held only that, because the Federal Rules of Criminal Procedure explicitly prohibited enlargement of the 10-day period for taking an appeal, a district court could not exercise its general authority to extend a filing deadline for "excusable neglect" by allowing an appeal out of time. In this case, there is no explicit conflict between the courts of appeals' exercise of their supervisory authority to dismiss former fugitives' appeals and any federal rule or statute.

3. *A Rule Authorizing Dismissal of a Fugitive's Appeal Serves Valid Interests Even If The Defendant Is Not at Large at the Time of the Dismissal*

This Court has already established that an appellate court may dismiss an appeal by a defendant who becomes a fugitive during the pendency of the appeal. In *Smith* v. *United States*, 94 U.S. 97 (1876), the defendant absconded after appealing from the judgment of a state supreme court, but prior to resolution of the appeal. The Court stated that "[i]t is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render." *Id.* at 97. The Court ordered the defendant's appeal to be dismissed unless he "submit[s] himself to the jurisdiction of the court below on or before the first day of our next term." *Id.* at 98. See also *Bonahan* v. *Nebraska*, 125 U.S. 692, 692 (1887) (ordering dismissal of appeal of a fugitive defendant "unless the plaintiff in error is brought or comes within the jurisdiction and under the control of the court below on or before the last day of this term"); *Eisler* v. *United States*, 338 U.S. 189 (1949) (per curiam) (applying *Smith* and *Bonahan* to remove from the Court's docket the case of a foreigner who fled the country after the Court granted his petition for a writ of certiorari).

More recently, in *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970) (per curiam), the Court declined to adjudicate the case of a defendant who fled after appealing his state conviction. The Court stated:

> No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who

> has sought review escapes from the restraints placed upon him pursuant to the conviction.

Id. at 366. The Court noted that the escape did not render the appeal moot. Rather, it "disentitle[d] the defendant to call upon the resources of the Court for determination of his claims." The Court went on to conclude, in light of the *Smith* and *Bonahan* decisions, that "[i]n the absence of specific provision to the contrary in the statute under which Molinaro appeals, 28 U.S.C. § 1257(2)," the Court had authority to dismiss the appeal. 396 U.S. at 366.

While the Court in *Molinaro* applied the principle of *Smith* and *Bonahan*, it broadened the rule announced in those cases: the Court did not make the dismissal contingent on the defendant's failure to return to custody by a certain date, nor did it indicate that the appeal would be reinstated under those circumstances. Rather, the Court made clear that an appellate court could respond to a defendant's flight during the pendency of an appeal by an immediate, unconditional dismissal of the appeal with prejudice, without regard to whether the defendant voluntarily returned or was recaptured. See, *e.g.*, *United States* v. *Shelton*, 508 F.2d 797, 798 (5th Cir.) (In *Molinaro*, the Supreme Court "unconditionally dismissed the appeal of a fugitive without waiting to see if he might return or be captured."), cert. denied, 423 U.S. 828 (1975); see also *United States* v. *Amado*, 754 F.2d 31, 32 (1st Cir. 1985) (noting that *Molinaro* leaves "no doubt of our authority to dismiss the appeal [of a fugitive] with prejudice").

Although the Court has not directly resolved the question whether a federal appellate court can dismiss an appeal even if the defendant is no longer at

large at the time of the dismissal, it has upheld state court orders declining to review convictions of escaped defendants even after they have been returned to custody. For example, in *Allen* v. *Georgia*, 166 U.S. 138, 142 (1897), the Court ruled that, after a fugitive defendant is recaptured, a state appellate court is under no obligation to reinstate an appeal that was dismissed while he was at large. And in *Estelle* v. *Dorrough*, 420 U.S. 534, 537 (1975) (per curiam), the Court upheld the Texas Court of Criminal Appeals' dismissal, pursuant to a state statute, of an appeal brought by a defendant who fled after appealing but was recaptured before the appellate court acted to dismiss his appeal. 420 U.S. at 534-536. The Court explained the rationale underlying the state statute that mandated dismissal even though the defendant had been returned to custody: it "discourages the felony of escape and encourages voluntary surrenders. It promotes the efficient, dignified operation of the Texas Court of Criminal Appeals." *Id.* at 537 (footnote omitted).

In these cases—and lower court cases that have applied these rulings to defendants who have absconded and been recaptured at various stages in the course of judicial proceedings—the courts have advanced a number of grounds for permitting appellate courts to exercise their authority to dismiss the appeals of fugitive defendants. First, with respect to a defendant who is still a fugitive at the time of the dismissal order, the courts have noted that an appellate court need not devote its limited resources to entertaining the appeal of a defendant against whom the court is unable to enforce an adverse judgment because he remains at large. See *Smith* v. *United*

States, 94 U.S. at 97. By consenting to hear an appeal under those circumstances, a court undermines its authority by allowing the absent defendant to "dictate the terms upon which he will consent to surrender himself to its custody." *Allen* v. *Georgia*, 166 U.S. at 141.

As suggested by the Court's holding in *Dorrough* (in which the Court upheld a state court's dismissal of a fugitive's appeal following his return), concern for enforcing adverse judgments is not the only or even the primary justification for a rule authorizing dismissal of fugitives' appeals. Rather, dismissal of an appeal is recognized as an appropriate response to the defiance and contempt for the judicial system shown by a defendant who absconds during the course of the proceedings. See *Allen* v. *Georgia*, 166 U.S. at 141 (the defendant's escape is a "contempt of [the court's] authority, to which no court is bound to submit"); see also *United States* v. *Holmes*, 680 F.2d at 1374; *United States* v. *DeValle*, 894 F.2d 133, 138 (5th Cir. 1990); *United States* v. *Wright*, 902 F.2d 241, 242 (3d Cir. 1990).

Significantly, appellate courts have invoked their authority to respond to defiance of the judicial system in justifying the dismissal of appeals by defendants even after they have been returned to custody. For example, in *United States* v. *Holmes*, *supra*, the court dismissed the appeal of a former fugitive who was recaptured two years after his conviction; following his arrest, he was sentenced and then took an appeal. The court explained that it "would fly in the face of common sense and sound reason" to allow former fugitives "to seek relief from the very legal system they previously had seen fit only to defy." 680 F.2d at 1374. In *United States* v. *Puzzanghera*, 820

F.2d 25 (1st Cir.), cert. denied, 484 U.S. 900 (1987), the First Circuit applied the *Molinaro* rule to a defendant who fled and was recaptured while his appeal was pending. In dismissing the appeal even though the defendant was back in custody, the court stated that "[i]n escaping, appellant has demonstrated his contempt for the justice system of which the appellate court is one part." The court further explained that "[m]erely because—no thanks to him—he is recaptured, it is not evident that he regains the right to review that he earlier forfeited." *Id.* at 26. The court noted that, "[h]ad his own plans not gone awry, he would still be at large; that he was recaptured does not redound to his credit." *Id.* at 27.

Finally, the courts have recognized that dismissal of an appeal is justified because the defendant's flight can have adverse effects on the administration of justice, resulting in delay and disruption at all stages of the judicial process. See *Estelle* v. *Dorrough*, 420 U.S. at 537 (rule of dismissal "discourages the felony of escape and encourages voluntary surrenders. It promotes the efficient, dignified operation" of the appellate court) (footnote omitted); see also *United States* v. *Persico*, 853 F.2d 134, 137 (2d Cir. 1988). As a general matter, "[e]scape, pursuit, and recapture not only put the government and the taxpayers to considerable expense, they often put a reviewing court to additional trouble * * * by diverting its attention from the merits of the appeal and involving it in a flurry of extraneous matters." *Puzzanghera*, 820 F.2d at 26.

As this case illustrates, the delay caused by a defendant's flight can result in the disruption of the appellate process and duplication of effort. Those effects are felt regardless of whether the defendant

is ultimately recaptured. Here, petitioner's flight resulted in what amounted to a forced severance of his case from that of his co-defendants, both for sentencing and for appeal. The needless and wasteful duplication of effort required to entertain separately the appeals of co-defendants in such cases disrupts the appellate process. *United States* v. *Matista*, 932 F.2d 1055, 1058 (2d Cir. 1991) (allowing a former fugitive's appeal to go forward separately from his co-defendants' appeals would disrupt the appellate process by encouraging "piecemeal appeals.") The delay occasioned by a fugitive's flight can have significant adverse effects on the trial court as well. If the appeal could result in a retrial, the government could be severely prejudiced by the delay; indeed, the defendant could receive the windfall of release without trial if the loss of documents or unavailability of witnesses as a result of the passage of time effectively foreclosed reprosecution. See *United States* v. *Persico*, 853 F.2d at 138. And if a new trial is ordered for all or several of the defendants, one defendant's fugitive status could mean that the district court would have to conduct multiple retrials.

In sum, it is a reasonable exercise of the supervisory power for a court to fashion an adjudicative rule authorizing it to dismiss the appeals of fugitive criminal defendants, regardless of whether the defendants are subject to the court's jurisdiction at the time the court acts on the motion to dismiss. If that is so, the only remaining question is whether that reasonable rule becomes unreasonable when it is applied to a defendant who flees after his conviction, but before he is sentenced and files his notice of appeal.

B. A Court of Appeals May Apply The Fugitive-Dismissal Rule To Defendants Who Flee After Conviction But Before Filing A Notice Of Appeal

1. The Same Policies That Support the General Rule Authorizing the Dismissal of Fugitives' Appeals Support the Dismissal of the Appeal in This Case

Many of the justifications advanced by this Court and others for permitting appellate courts to dismiss fugitives' appeals apply with full force when the defendant, as in this case, flees after conviction and is returned to custody before he is sentenced and files a notice of appeal. Therefore, it is not unreasonable for a court of appeals to apply the fugitive-dismissal rule to former fugitives who flee after conviction, even if they are captured before they formally initiate proceedings in an appellate court.

This Court has not directly addressed this issue, but the Court's decision in *Estelle* v. *Dorrough*, *supra*, is instructive on the point. The Texas statute at issue in *Dorrough* applied only to post-appeal flight. The Court explained that the different treatment accorded to pre-appeal and post-appeal flight under the statute was rational, because most defendants who fled prior to appeal would be precluded from appealing by their inability to meet appellate filing deadlines. The Court added that Texas was "free to deal more severely with those who simultaneously invoked the appellate process and escaped from its custody than with those who first escaped from its custody, returned, and then invoked the appellate process within the time permitted by law." 420 U.S. at 541. In upholding, against an equal protection challenge, the distinction drawn by the state legislature, however, the Court did not in any way suggest that dismissal of the appeal of a defendant who escaped prior to filing an appeal

would be inappropriate, unconstitutional, or inconsistent with the policies underlying the Court's precedents in this area. To the contrary, the clear implication of the Court's analysis was that a state statute would be valid if it provided for dismissal of appeals not only by defendants who absconded after filing a notice of appeal, but also by those who absconded before doing so.[4]

Considerations that the courts have recognized as supporting the dismissal of fugitives' appeals will often apply to a defendant who flees and is returned to custody before his appeal is filed. Like a defendant who flees after appealing and remains at large, a defendant who flees prior to sentencing proclaims his unwillingness to submit to the orderly workings of the judicial process. The defendant's defiance of the legal system is not rendered less serious by his involuntary apprehension. On the contrary, a fugitive who is returned to custody against his will should not be allowed to "seek relief from the very legal system that [he] previously had seen fit only to

[4] Ironically, the court of appeals in *Dorrough* struck down the Texas statute on equal protection grounds because the statute distinguished between defendants who fled before filing a notice of appeal and those who fled after filing a notice of appeal. In the court of appeals' view, it was irrational to distinguish between those two classes of cases. See *Dorrough* v. *Estelle*, 497 F.2d 1007, 1012 (5th Cir. 1974); *Estelle* v. *Dorrough*, 420 U.S. at 539, 540. If the defendant had prevailed on that contention in this Court, presumably the court of appeals' rule in this case not only would be permissible, but would be a constitutionally mandated extension of the principles of *Molinaro*. As it is, the Court held that it was not irrational for the state legislature to distinguish between the two classes of cases, but it certainly did not suggest that it would be unreasonable to treat the two classes of cases similarly.

defy." *United States* v. *Holmes*, 680 F.2d at 1374. Had such a defendant eluded recapture and remained at large, he could not have maintained an appeal. It is illogical to "reward" him for his recapture by revesting in him a right he lost when he opted for flight. See *United States* v. *Puzzanghera*, 820 F.2d at 27 (fugitive returned to custody during pendency of appeal should not be "handed back his forfeited right of appellate review," because his recapture should "not redound to his credit"); *United States* v. *Persico*, 853 F.2d at 137 (fugitive who is forcefully apprehended "deserves no credit for the recapture that brings him back before the court"); *United States* v. *Parrish*, 887 F.2d at 1108 (same).

Likewise, a defendant's flight may have a significant adverse effect on the administration of justice at both the appellate and the trial level, even if the defendant is recaptured before an appeal is filed in his case. In a case such as this, where petitioner remained a fugitive while his co-defendants' appeals were being processed, his flight imposed exactly the same burden of duplication on the court of appeals that it would have if he had filed his notice of appeal before absconding. And the potential for prejudice, expense, and inconvenience at the trial level is just as great in a case like this as in a case in which the defendant escapes after the appeal has been noted. The trial court might be forced to entertain the defendant's post-conviction motions after considerable delay. And where an appeal might lead to a retrial, the prosecution would be equally prejudiced by the delay occasioned by the defendant's absence, regardless of whether the period of delay began before or after the filing of the notice of appeal.

The distinction between a case in which the defendant became a fugitive after the appeal was filed and

one in which the defendant became a fugitive (and was recaptured) before the filing of the appeal is particularly insignificant in a case such as this one. In this case, the only reason petitioner's fugitivity did not extend into the appeal period is that a notice of appeal was not filed at the time petitioner was first sentenced. Petitioner was sentenced *in absentia*, and his counsel apparently chose not to file a notice of appeal on his behalf within ten days of the sentencing. If counsel had done so, the court of appeals presumably would have dismissed petitioner's appeal from his conviction on the authority of this Court's decisions from *Smith* through *Molinaro*, and petitioner would not have had any right to reinstatement of the appeal when he was captured 11 months later.

Because petitioner was scheduled to be sentenced on June 15, 1989, and (if he had appeared for sentencing) would have had to file a notice of appeal within 10 days of that date, it was only petitioner's decision not to appear for sentencing that kept his case from proceeding to the appellate stage. Because petitioner's failure to appear and his failure to file a notice of appeal at that time are the only factors that distiguish petitioner's case from the case of a defendant who appeared for sentencing, filed a notice of appeal, and absconded the following day, it was reasonable for the court of appeals to treat petitioner's 11-month post-trial period of fugitivity in exactly the same manner that it would have treated a similar period following the filing of a notice of appeal. Petitioner cannot, by his misconduct, create the conditions that artifically kept his case pending in the district court, and then use the fact that his case had not been pending before the court of appeals while he was a fugitive to fend off a motion to dismiss his appeal.

2. *The Rule Applied by the Court of Appeals in This Case Was Not Unduly Broad*

a. Although petitioner challenges the court of appeals' dismissal order in several respects, he does not suggest that a court may never dismiss the appeal of a former fugitive. Rather, he suggests that the courts' authority must be exercised on a case-by-case basis, and that an appeal may not be dismissed unless concrete "prejudice" results from the defendant's flight. Pet. Br. 7, 11.

This Court should not require courts of appeals to make a finding of prejudice before dismissing a fugitive's appeal. Other rules governing conditions on taking appeals do not require a showing of prejudice before an appeal can be dismissed. The timing requirements imposed by the Federal Rules of Appellate Procedure for filing a notice of appeal or filing a brief can be applied regardless of whether a particular default has resulted in specific prejudice to the court or to the opposing party. And, as petitioner implicitly concedes, the *Molinaro* rule authorizing dismissal of appeals of defendants who flee during the pendency of an appeal does not require proof of prejudice before a dismissal order may be entered in a particular case. Indeed, one reason often advanced for formulating a general rule is to avoid the need to establish a special justification for a particular action in every case. See *Arizona* v. *Roberson*, 486 U.S. 675, 681-682, (1988); *Arizona* v. *Maricopa County Medical Soc'y*, 457 U.S. 332, 351 (1982); *Weinberger* v. *Salfi*, 422 U.S. 749, 772-777 (1975); *id.* at 777 ("[T]he question raised is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute. Such a rule would ban

all prophylactic provisions.") It is enough to satisfy the requirement of reasonableness that the legitimate concerns that the rule seeks to promote are generally implicated by cases falling within the class covered by the rule. And, for the reasons given above, that standard is fully satisfied by the rule of dismissal applied by the court of appeals in this case.

In any event, even if some showing of prejudice from the defendant's flight is a prerequisite for dismissal, there was ample justification for the court of appeals' decision to dismiss petitioner's appeal. Contrary to petitioner's suggestion (Br. 12), the delay caused by his absence was not without adverse effect on the appellate process. As already noted, entertaining petitioner's appeal would have forced the court of appeals to consider petitioner's claims apart from the closely related claims of his co-defendants. Although, as petitioner points out (*ibid.*), his appeal was unlikely to result in further proceedings at the trial level (thus obviating any prejudice to the government upon retrial), petitioner's flight did require the trial court, almost a year after sentencing petitioner *in absentia*, to entertain his motion to vacate that sentence and then to resentence him—a wasteful expenditure of judicial time and resources. Moreover, the court of appeals was entitled to take into consideration that petitioner did not return voluntarily but rather was recaptured after effort and expense by the government.

To restrict the *Molinaro* rule to cases in which the appeal is pending when the defendant becomes a fugitive would mean that even after a defendant such as petitioner is captured, he would be entitled to resentencing and to an appeal on exactly the same terms that he would have enjoyed had he never taken flight

in the first place. Such a rule would encourage flight between the time of conviction and the time of sentencing, when there would be no risk of losing the right to appeal. It would therefore disserve the interest in "discourag[ing] the felony of escape and encourag[ing] voluntary surrenders," which this Court has identified as legitimate objectives of a fugitive-dismissal rule. *Estelle* v. *Dorrough*, 420 U.S. at 537. In the case of a defendant facing a very long sentence on the offense of conviction, the risk of prosecution and consecutive sentencing for bail jumping may not be a sufficient deterrent to flight.[5] A defendant in petitioner's position, whose co-defendants are pursuing an appeal, can abscond, wait until the court decides the co-defendants' appeals and then, if

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[5] Petitioner claims that, since he has already been punished for his flight by imposition of a separate term of imprisonment, dismissal of his appeal constitutes a duplicative sanction and an unnecessary vindication of the court's authority. Br. 12-13. However, dismissal of a former fugitive's appeal because of flight is no more a "punishment" than is dismissal of such an appeal for failure to meet the filing deadline. Regardless of whether a fugitive is separately punished, the courts are entitled to formulate rules to promote respect for and obedience to the judicial system, and to ensure its efficient and orderly operation. See *United States* v. *Puzzanghera*, 820 F.2d at 27 (noting that dismissal of defendant's appeal was justified despite the fact that he was "subject to separate punishment for the escape" because his conduct had "burdened this court with additional time-consuming activities"). Subjecting fugitives to criminal sanctions as well as to the threat of dismissal will have the desirable—and permissible—effect of making flight an even "less attractive option." *United States* v. *Persico*, 853 F.2d at 138. Therefore, petitioner's separate prosecution for escape should have no bearing on whether the court of appeals may dismiss his appeal.

their cases turn out well, return for his own sentencing and appeal. That is precisely the sort of manipulation that this Court in its decisions from *Smith* through *Molinaro* has sought to combat.

b. Petitioner implies (Br. 8-11) that this Court cannot uphold the judgment of the court of appeals without endorsing a "rule of automatic, mandatory dismissal" of appeals by former fugitives who flee before sentencing and return before filing their appeals. He claims that the Eleventh Circuit has established such a rule in previous cases in which it dismissed appeals filed by defendants who fled during trial, see *United States* v. *London*, *supra*, or after conviction, see *United States* v. *Holmes*, *supra*, and were recaptured prior to filing an appeal.

The validity of the court of appeals' decision in this case does not turn on whether it would be proper to dismiss the appeal of every former fugitive who returned before filing his appeal. Like this case, both *London* and *Holmes* involved fugitives who were absent for lengthy periods (two years in *Holmes* and three years in *London*) and who were returned to custody involuntarily. The court in those cases, as in this case, did not hold that the same rule would necessarily apply to a defendant who became a fugitive for a very brief period and returned voluntarily before the filing of the appeal, any more than this Court would consider itself bound by its decisions from *Smith* to *Molinaro* to dismiss the case of a defendant who absconded for only a brief period during the time the appeal was pending.

Petitioner suggests that, because the court of appeals in this case dismissed petitioner's appeal without reference to the particular facts of this case, it must have intended to adopt a sweeping, absolute rule

of dismissal for every fugitive defendant, regardless of the circumstances of the case. That, however, is not a fair inference from the court's unelaborated orders. The court was fully apprised of the particular facts of this case, through detailed briefing, before it entered the two orders at issue here, see J.A. 66-77, 79-92, and the dismissal order can therefore be assumed to have taken the facts of the case into account.

Even if the court of appeals would apply its rule of dismissal rigidly in every case of flight by a defendant at some point during the judicial process,[6] that would not render the rule unreasonable as applied to petitioner, and it would not give petitioner the right to benefit from the possible unreasonableness of the

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[6] The dismissal rule that the Eleventh Circuit announced in *Holmes* is not absolute. First, in *Holmes* itself the court made clear that the rule does not foreclose an appeal challenging the lawfulness of the sentence; it bars only a challenge to the underlying conviction. *Holmes*, 680 F.2d at 1373; see also *London*, 723 F.2d at 1539. Moreover, one commentator has concluded that the rule in *Holmes* was not intended to be inflexible, even with respect to appeals from the underlying conviction. See Grippando, *Fear of Flying—The Fugitive's Fleeting Right To A Federal Appeal*, 54 Fordham L. Rev. 661, 689 n.161 (1986). "The very fact that the [*Holmes*] court qualified its statement [explaining the rationale for dismissal] by noting that delay precludes a meaningful appeal 'in many cases,' rather than all cases," suggests that the court did not lay down "a blanket rule of dismissal." *Id.* at 689 (footnote omitted). Certainly, there is nothing in the brief orders of dismissal in this case to indicate that the court intends to apply *Holmes* in an inflexible manner and to order dismissal regardless of the reasons for the defendant's flight, the period of his fugitivity, or the circumstances of his return. Finally, the Eleventh Circuit has not foreclosed a former fugitive from pursuing a collateral attack on his conviction on grounds that would be available to a defendant who failed to perfect his right to direct review.

rule as applied to some hypothetical third party. See *Estelle* v. *Dorrough*, 420 U.S. at 540 (questioning how the defendant, who was sentenced to 25 years' imprisonment, could assert an alleged irrationality in the Texas statutory scheme that would affect only persons sentenced to 60 years' imprisonment or more). Because the Eleventh Circuit's fugitive-dismissal rule is reasonable as applied to a defendant in petitioner's position, the judgment of that court dismissing the appeal should be upheld.[7]

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[7] At several points in his brief, petitioner notes that the court of appeals held the evidence insufficient to support the conviction of his co-defendant Osvaldo Becerra-Flores, the other crewman on the *Wilfred*. Petitioner argues that it would result in a miscarriage of justice to dismiss his appeal when a similarly situated defendant has been released. If a rule of dismissal is valid, however, it must be valid not only for defendants whose appeals would have failed, but also for those whose appeals would have succeeded. The consequence of forfeiture of the right to appeal is that the defendant must be content with the judgment of a jury and a single judge rather than the judgment of an appellate court. In any event, if the sufficiency of the evidence against petitioner is relevant, we submit that it is by no means clear that the court of appeals resolved Becerra-Flores' case correctly. The evidence was sufficient to show that the *Wilfred* was in the Cay Sal area during the time that the bales of contraband were dropped into the water and then hauled onto the shore, and that the *Wilfred* then departed the area under circumstances suggesting flight. Footprints were seen on the beach between the bales and the area of the water where the *Wilfred* was seen. Moreover, when the *Wilfred* was stopped, the crew had no other convincing explanation for their presence in the area. From that evidence, and the fact that only the three defendants made up the crew of the *Wilfred*, the jury could permissibly conclude that the crew of the *Wilfred* transported the bales onto the shore and that each of the defendants participated in the drug conspiracy charged in the indictment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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